In the matter of :	)	
Expedited Consideration for Declaratory Rulings	)	
On the transfer of traffic only under AT&T	)	
Tariff Section 2.1.8., and Related Issues	)	
	)	
Primary Jurisdiction Referral	)	
From the NJ District Court	)	
	)	WC Docket No. 06-210
One Stop Financial, Inc.	)	DA-06-2360
Group Discounts, Inc.	)	Formerly CCB/CPD 96- 0
Winback & Conserve Program, Inc.	)	
800 Discounts, Inc.		
	)	
Petitioners	)	
and	)	
	)	
AT&T Gorp.		
Respondent	)	

EX PARTE COMMENTS OF AT&T CORP.

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Petitioners' latest submissions call to mind Humpty Dumpty's famous statement that, "[w]hen I use a word . . . it means just what I choose it to mean—neither more nor less." *Alice in Wonderland.* In petitioners' case, when they read a statement—by AT&T, the Commission, Judge Politan or the D.C. Circuit—that statement "means just what they choose it to mean"—notwithstanding all context, logic and evidence to the contrary. Although AT&T does not wish to burden the Commission with a detailed refutation of all of the "concessions" and favorable "rulings" petitioners falsely trumpet in their numerous filings, it submits these comments to address petitioners' key distortions.

As the Wireline Competition Bureau recognized in its January 12, 2007 order, the central issue in this proceeding is quite simple. At *the* time of the events that give rise to this dispute, § 2.1.8 provided that:

> WATS, including any associated telephone number(s), may be transferred or assigned to a new Customer, *provided that* . . . [t]he new Customer notifies [AT&T] in writing that it agrees to assume *all obligations* of the former Customer at the time of the assignment or transfer.

Exh. 1 to AT&T Comments (emphases added). Despite the welter of submissions they have made in this proceeding, petitioners have offered no coherent explanation of how the phrase "all obligations'' can be interpreted to mean "only some obligations," or "some, but not all, obligations." In their Reply Comments, petitioners did not actually interpret the language of § 2.1.8, but instead attempted to amend it. They argued that, under § 2.1.8, the "customer accepts the obligations *only on* ***the*** *WATS* ***if accepts,"*** *id.* at 61 (emphasis added), or that "Section 2.1.8's all obligation language relates to all the obligations *for what is selected and* ***reported*** *by transferee* to *AT&T.*" *Id.* at ***44*** (emphasis added).[1] The italicized words in each of these quotes,

[1] See *also* id. ("the New Customer has **to accept** all the obligations *on the* WATS which *it* accepts *from the old customer")* **(emphasis** added); *id* at *70* (PSE **had** to "assume all the obligations on *only what part of WATS it*

however, do not appear in § 2.1.8 itself; petitioners have simply added them to the tariff in an impermissible attempt to limit its scope. As a variation, petitioners argue that "S&T obligations are plan obligations not traffic obligations such as indebtedness." ***Id,*** at 65. Again, no such distinction appears in the language of the tariff. Petitioners have created it from wholecloth.

It is precisely because they can offer no credible or plausible interpretation of the "all obligations" language that petitioners have resorted to arguing that the limitations they seek to engraft onto § 2.1.8 have already been recognized by Judge Politan (even though he asked the Commission to determine what § 2.1.8 means); by the Commission (even though it stated that § 2.1.8 did not **apply** to the traffic transfer at issue); by the D.C. Circuit (even though it **expressly** stated that it was not addressing the issue); and by AT&T, whom petitioners incessantly and intemperately accuse of "lying," "scamming," and "conning." None of these claims has merit, and none can change the clear meaning of the phrase "all obligations."

STATEMENT

In their **April** 4th **Ex** Parte, petitioners claimed that, in **a** November 1995 brief to Judge Politan, AT&T explicitly conceded that **"under the tariff PSE is not reponsible *to* assume** the **plan oblieations** (revenue commitments and associated shortfall **and** termination charges)—CCI remains obligated for these plan obligations." *Id.* at **2.** AT&T responded to this distortion by explaining that, in the passage petitioners quoted, AT&T was describing the transfer that ***petitioners proposed,*** not the requirements of § 2.1.8, and that AT&T was describing the harms it would suffer if it was compelled to execute a transfer in which the transferee did not comply with § 2.1.8's requirement that it accept "all" of the transferee's obligations. *See* AT&T's Response to Petitioners' Ex Parte Comments Concerning AT&T's **Supposed** "Concession" to the

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accepted") (emphasis added); ***id.*** **at** 50 (the "transferee must **assume all** the obligations *on only* ***the accounts that it accepts")*** (emphasis **added).**

District Court and The "Notice" Purporting to Close the Comment Period ("AT&T's Response to **April** 4th and **9" Ex** Partes") at 2. Petitioners claim that this obviously correct explanation is a "cover-up." Petitioners' April 18th **Ex** Parte at 1. Yet, while they claim to "thoroughly destroy[]" this cover-up, ***id.,*** petitioners simply offer another acontextual quotation. They note that AT&T counsel Fred Whitmer told Judge Politan that "[t]hese charges are all 'tariffed' obligations,' for which CCI, 'not PSE' (which would have the revenue stream to satisfy such charges), would be obligated." *Id.* According to petitioners, in this quote Mr. Whitmer "clearly associates that traffic only transaction as per what the tariff calls for. He explicitly stated these *are* all 'tariffed' obligations." ***Id.***

This is yet another example of petitioners reading a statement to mean "just what **they** choose it to mean." Mr. Whitmer's use of the conditional verb "would" makes clear that he is talking about what *would* happen if AT&T were forced to process the transfer that petitioners *proposed.* Under the proposed transfer, CCI would have remained subject to shortfall and termination obligations—which are indisputably **"tariffed** obligations"—and **PSE** would not have assumed those obligations. By referring to "tariffed obligations," Mr. Whitmer was manifestly not describing how § 2.1.8 operates; he was identifying the "tariffed obligations" that PSE was seeking to shirk by refusing to accept *all* of CCI's "tariffed obligations," as § 2.1.8 required.

Petitioners' reliance on Judge Politan's March 1996 decision—which was reversed by the Third Circuit—suffers from the same defect. Petitioners claim that Judge Politan was analyzing a transaction "under the tariff," and that "[t]here was no language about a proposed transaction outside the scope of 2.1.8." *Id.* at **2.** But the lengthy passage petitioners quote from Judge Politan begins by stating that "AT&T has little or no danger of being harmed should the *sought-*

for relief be granted." *Id.* (emphasis added). The "sought-for relief," of course, was an injunction compelling AT&T to process a proposed transfer in which PSE refused to accept all of CCI's obligations.[2]

As they did in their Reply Comments (at 89-99), petitioners claim that CCI and PSE never proposed "a transaction that did not conform to the tariff." April 18th Ex Parte at 3. This assertion simply begs the question of what the tariff required. There is no dispute that petitioners submitted transfer forms with the words "traffic only" written on them, and that PSE did not agree to assume CCI's shortfall and termination obligations. Because § 2.1.8 required PSE to assume "*all*" of CCI's "obligations," and because PSE did not do so, the proposed transfer failed to "conform to the tariff." Petitioners' *ipse* dixit assertions to the contrary do not change that fact.

Petitioners also continue to flog statements AT&T counsel David Carpenter made before the D.C. Circuit, and claim that AT&T has offered only "fictitious" and "comical" "cover-ups" for these "concessions." April 18th Ex Parte at 12-13. Once again, however, petitioners ignore the relevant context in which these statements were made. Nowhere did he concede that the phrase "all obligations" did not include shortfall and termination obligations, or that these latter obligations do not transfer where, as here, virtually all traffic was transferred. To the contrary, Mr. Carpenter took the position that § 2.1.8's "all obligations" requirement applied even where only 1 percent of an aggregator's traffic was being transferred,[3] and he elsewhere stated that the

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[2] As AT&T has previously explained, it defies logic and commonsense to argue that AT&T sought a $15 million bond to protect it from harms caused by the operation of § 2.1.8 itself. Yet, petitioners make precisely this absurd argument. *See* April 18 Ex Parte at 7 (AT&T sought a bond "because AT&T acknowledged that under the tariff the plans revenue commitments stayed with CCI on a traffic only transfer").

[3] During oral argument, Mr. Carpenter argued that a customer would violate § 2.1.8 by "moving all the 800 service that it receives under the plan without assuming any of the liabilities." *See* Exh. 1 attached hereto, p. 8. Judge Ginsburg then asked, "if the customer wanted to transfer or assign 1 percent . . . of the numbers involved to a different aggregator, that would be, that would not run afoul of the tariff?" *Id.* Mr. Carpenter responded: "That *would* run afoul of the tariff." *Id.* (emphasis added).

whole point of § **2.1.8** "was to condition service transfers on the assumption of the very liabilities that weren't transferred here." **Exh.** 1, p. **39.**

Petitioners also point to a statement in AT&T's reply brief in the Third Circuit, where AT&T made this same point. In the passage in question, AT&T stated:

> CCI then, incongruously, seeks to defend the District Court by citing "record evidence" that addressed transfers of individual end user locations (not entire plan's liabilities), and showed that the only "obligation" transferred to the "new customer" in that event is the unpaid liability associated with the individual end user location that is transferred. . . But that is self-evident under the tariff.

April 23rd **Ex** Parte, Exh. D. Contrary to petitioners' claim, AT&T was not "admit[ting]" in this passage that it was **"self-evident** that S&T obligations don't transfer under the tariff." *Id.* at 6. AT&T's quote refers to the transfer of a single "location."

In this regard, it is important to note that AT&T's principal argument before the Third Circuit was that, because petitioners were proposing to transfer all but a handful of locations, the transaction was no different from a transfer of the entire plan, and even petitioners admitted that a plan transfer triggered § 2.1.8's "all obligations" requirement. This argument, which is reflected in the statements petitioners' quote from Mr. Carpenter's argument to the Third Circuit, April 18th **Ex** Parte at 13, is entirely consistent with the argument that § 2.1.8 applies to traffic transfers generally, and it is certainly not **a *concession*** that § 2.1.8 does not require a transferee to accept "all obligations" in a traffic transfer.

Indeed, while petitioners myopically focus on snippets from briefs and **oral** arguments, what they fundamentally ignore (and hope the Commission will ignore) is that AT&T's position before the Third and D.C. Circuits was that ***the very transfer*** *at* ***issue here*** *violated § 2.1.8 because PSE* ***refused*** *to* ***accept "all"*** *of CCI's obligations.* That is precisely why AT&T was arguing before the D.C. Circuit that § 2.1.8 applied to this very traffic transfer. It is simply

preposterous for petitioners to claim that, in addressing a hypothetical transfer of a single location, AT&T was conceding away its entire case.[4] In so arguing, petitioners invite the Commission to make the same error that the D.C. Circuit identified in the Commission's last decision—*i.e.*, failing to interpret the tariff itself, and instead deciding the case on the basis of **alleged** "concessions." *See AT&T Corp v. FCC*, 394 F.3d 933, 937 (D.C. Cir. 2005) ("AT&T did not concede the inapplicability of Section 2.1.8 to transfers of traffic only. Indeed, had AT&T been willing to make such a concession, it presumably would not have contested the meaning of this provision before the Commission. Accordingly, the FCC's reliance on AT&T's comment is plainly misplaced.").

At bottom, there are two central facts that no mount of **bluster** and name-calling by petitioners can obscure: 1) AT&T has consistently maintained that § 2.1.8 governs the **very** traffic transfer at issue here; and 2) AT&T has consistently argued that that transfer violates § **2.1.8** because PSE did not agree to accept "all obligations" of CCI. And no amount of diversionary rhetoric can change the fact that "all obligations" necessarily includes shortfall and termination obligations.

Indeed, petitioners actions show that they do not believe their own rhetoric and bravado. They claim to have "thoroughly destroyed" AT&T's alleged **"cover-ups," April** 18th Ex Parte at 1, and in submissions earlier this month, they brazenly announced that the public comment **period** was closed, that the "traffic only transfer issue is now finalized in petitioners [sic] favor,"

[4] It is equally preposterous to argue that, in its October 2003 decision, the Commission "utilized section 2.1.8 to interpret precisely which obligations **are** transferred." **April** 18th **Ex** Parte at 14. The Commission expressly stated that § 2.1.8 "did **not** ***address—and*** therefore did not **preclude** *or otherwise govern*—the movement of end-user traffic." See Request for Declaratory Ruling, **Exh.** B, Commission 2003 Decision at ¶ **9** (emphases added). Petitioners claim this **not a** statement that § 2.1.8 does not address or otherwise **govern** "the OBLIGATIONS ALLOCATION **ANALYSIS."** April 18th Ex Parte at 15. **This** is **utter** nonsense. **By** saying that the provision does not **apply** at all, the Commission **was** plainly disclaiming **any** determination about what obligations have **to** be assumed when § 2.1.8 does apply. This is not a "master con." *Id.* In fact, the D.C. Circuit squarely held that the question of "precisely which obligations should have been transferred in this case" had not been **addressed** by the Commission. *AT&T v. FCC*, **394** F.3d at 939. Petitioners' persistent claims to **the** contrary are simply frivolous.

and that the Commission was to "to issue 203(c) violation on the traffic only transfer issue." April 9th **Ex** Parte at **2.** Yet, since making these declarations of "victory," petitioners have inquired whether **the** Commission will temporarily suspend these proceedings so that they can seek summary judgment from the district **court.** ***See*** Email from Mr. Al Inga to **Ms.** Deena Shetler (April 26,2007). If the issue is so clear, why run from **the** Commission now and begin anew in court? The reason is obvious: in addition to displaying **a** cavalier disregard for the expense that their seemingly endless filings have inflicted on the agency **and** AT&T, petitioners' request reveals a justifiable concern that the Commission will rule that the phrase "all obligations" naturally encompasses, and thus requires the transfer of, a transferor's obligation to pay shortfall charges. The Commission should so rule in order to forestall the submission of further frivolous pleadings by petitioners.

Respectfully submitted,

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May 1,2007

CERTIFICATE OF SERVICE

I hereby certify that, on this first day of May, 2007, I served the foregoing **"Ex Parte** Comments of AT&T" by first class mail to the following:

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EXHIBIT 1

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JUDGE GINSBURG: But if you can find a place where it's textually demonstrable on rebuttal, that would be helpful.

MR. CARPENTER: I will try to do that. But, you know, *the* ultimate issue here is what of course the term means in the context of 2.1.8 of AT&T's tariff, and the question is really whether it, this provision applies when you have a customer with a plan, and it's moving all the 800 service that it receives under the plan without assuming any of the liabilities.

JUDGE GINSBURG: So is it your understanding that if the customer wanted to transfer or assign 1 percent --

MR. CARPENTER: Yes.

JUDGE GINSBURG: -- of the numbers involved, right, to a different aggregator, that would be, that would not run afoul of the tariff?

MR. CARPENTER: That would run afoul of the tariff.

JUDGE GINSBURG: It would?

MR. CARPENTER: But that's not, of course not this case. But *yes*, and when people move one or two lines, they use our transfer-of-service forms. Remember, the whole point of this is --

JUDGE ROBERTS: But you've allowed that in the

pro quo for the discounts they received had to move, too. The only explanation for this, and none was ever offered other than this below, was that they wanted to diminish our ability to evade, to collect the shortfall charges.

And the provisions of the tariff that you were discussing with Mr. Bourne and also the provisions that appear on JA 418 are provisions that give us recourse against the location in the event that the tariff charges aren't paid. And the one thing that we unequivocally lost, I think the arguments that CCI was somehow better off under this deal are just nonsense, because they had to pay twice for the service, once to PSE, again to AT&T.

But all that aside, we gave up, we lost our bill, our recourse against the end user locations as a result of this transfer, and that's something that our tariff explicitly protected against. The only reason for this tariff was to condition service transfers on the assumption of the very liabilities that weren't transferred here.

So unless you have further questions, which spparently you *do* --

JUDGE GINSBURG: No, but I do think that we're starting to grasp why it took the Commission seven years to resolve this problem. Thank you, Mr. Carpenter.

MR. CARPENTER: Thank you.